87-1098
No.

Supreme Court, U.S.
FILED
DEC 28 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1987

LAKE HAVASU CITY,

PETITIONER,

vs.

RANCHO DISPOSAL SERVICE, INC.,

RESPONDENT.

Petition For A Writ Of Certiorari
To The United States Court Of
Appeals For The Ninth Circuit

ROBERT K. CORBIN
Attorney General Of Arizona
Counsel of Record

ALISON B. SWAN
Chief Counsel
GARY P. BRADY
Assistant Attorney General
Antitrust Division
1275 West Washington
Phoenix, Arizona 85007
(602) 255-4751
Counsel for Petitioner

December 28, 1987

QUESTIONS PRESENTED

1. Whether this Court's decision in Carson v. American Brands, Inc., 450 U.S. 79 (1981), requiring a showing of serious consequences in order to appeal interlocutory orders under 28 U.S.C. § 1292(a)(1), applies to orders that explicitly deny injunctive relief and address the merits of the claim?

2. Whether a court of appeals may invoke Rule 38, Fed. R. App. P., to impose sanctions in an appeal that has substantial merit?

3. Whether a district court may decide the relief necessary to remedy an antitrust violation in the context of a summary judgment proceeding, without the opportunity to know the nature of the violation?

4. Whether a bid rigging conspiracy is a continuing conspiracy requiring injunctive relief if some, but not all, of the conspirators continue to receive economic benefits as a result of their conspiracy?

LIST OF PARTIES

The parties to the proceedings below were Lake Havasu City; Rancho Disposal Service, Inc.; Joe Turner; and Turco Disposal, Inc.

TABLE OF CONTENTS

	Page
Questions Presented	i
List Of Parties	iii
Table Of Contents	iv
Table Of Authorities	vi
Opinions Below	2
Jurisdiction	2
Statutory Provisions Involved	2
Statement Of The Case	4
Reasons For Granting The Writ	11
I. The Lower Courts Are Divided On How To Apply This Court's Decision In *Carson* To Interlocutory Appeals Of Injunction Orders	11
II. The Decisions Of The Courts Below Conflict With Decisions Of This Court	19
III. The Courts Of Appeals Are Divided On Determining Whether A Bid Rigging Conspiracy Is A Continuing Conspiracy	23

TABLE OF CONTENTS (cont'd)

Page

IV. Rule 38 Was Inappropriately Used As A Basis For Awarding Sanctions 25

Conclusion 31

Appendix 1a

Ninth Circuit Memorandum Decision 2a

Ninth Circuit Order Denying Rehearing 5a

District Court Order 6a

TABLE OF AUTHORITIES

Cases: Page

Acosta v. Louisiana Dept. of Health and Human Resources, 106 S.Ct. 2876 (1986) 26

Brown v. Kerr-McGee Chemical Corp., 767 F.2d 1234 (7th Cir. 1985), cert. denied, 106 S.Ct. 1378 (1986) 13

Cable Holdings of Battlefield, Inc. v. Cooke, 764 F.2d 1466 (11th Cir. 1985) 16

Carson v. American Brands, Inc., 450 U.S. 79 (1981) 11, 12

Center for National Security Studies v. Central Intelligence Agency, 711 F.2d 409 (D.C. Cir. 1983) 14

Commodity Futures Trading Comm. v. British American Commodity Options Corp., 560 F.2d 135 (2d Cir. 1977) 30

Donovan v. Robbins, 752 F.2d 1170 (7th Cir. 1984) 15

Gould v. Control Laser Corp., 650 F.2d 617 (5th Cir. 1981) 17

Grunewald v. United States, 353 U.S. 391 (1957) 8

TABLE OF AUTHORITIES (cont'd)

Cases: Page

I.A.M. National Pension Fund v. Cooper Industries, Inc., 789 F.2d 21 (D.C. Cir.), cert. denied, 107 S.Ct. 473 (1986) 16

Kehr v. Smith Barney, 736 F.2d 1283 (9th Cir. 1984) 25

SEC v. Koracorp Industries, Inc., 575 F.2d 692 (9th Cir. 1978) 10, 27, 28

SEC v. Murphy, 626 F.2d 633 (9th Cir. 1980) 29, 30

South Bend Consumers Club, Inc. v. United Consumers Club, Inc., 742 F.2d 392 (7th Cir. 1984) 16

Sturgeon v. Airborne Freight Corp., 778 F.2d 1154 (5th Cir. 1985) 25

Tokarcik v. Forest Hills School District, 665 F.2d 443 (3d Cir. 1981), cert. denied sub nom., Scanlon v. Tokarcik, 458 U.S. 1121 (1982) 15

United States v. Concentrated Phosphate Export Assn., 393 U.S. 199 (1968) 28

TABLE OF AUTHORITIES (cont'd)

Cases: Page

United States v. Glaxo Group, Ltd., 410 U.S. 52 (1973) 22

United States v. Loew's, Inc., 371 U.S. 38 (1962) 22

United States v. Northern Improvement Co., 814 F.2d 540 (8th Cir.), cert. denied, 108 S.Ct. 141 (1987) 23, 24

United States v. RMI Co., 661 F.2d 279 (3d Cir. 1981) 17

United States v. United States Gypsum Co., 340 U.S. 76 (1950) 22

United States v. Walker, 653 F.2d 1343 (9th Cir. 1981) 7

United States v. Ward Baking Co., 376 U.S. 327 (1964) 19, 21, 27

Williams v. Alioto, 549 F.2d 136 (9th Cir. 1977) 28

Winterland Concessions Co. v. Trela, 735 F.2d 257 (7th Cir. 1984) 14

TABLE OF AUTHORITIES (cont'd)

Cases: Page

Woodard v. Sage Products, Inc., 818 F.2d 841 (Fed. Cir. 1987) 16

Rules and Statutes:

15 U.S.C. § 15 5

15 U.S.C. § 26 . . . . . 2, 5

28 U.S.C. §§ 1331 and 1337 5

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1292 . . . . . Passim

Fed. R. App. P. 38 . . . . . 4, 11, 25

Other Authority:

C. Wright, A. Miller, and E. Cooper, Federal Practice and Procedure, § 3924 (Supp. 1987) 18

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1987

LAKE HAVASU CITY,

PETITIONER,

vs.

RANCHO DISPOSAL SERVICE, INC.,

RESPONDENT.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

---

Lake Havasu City respectfully prays that a writ of certiorari issue to review the memorandum decision of the United States Court of Appeals for the Ninth Circuit, entered on May 14, 1987.

OPINIONS BELOW

The memorandum decision of the United States Court of Appeals for the Ninth Circuit is reported at 818 F.2d 869 (Table), and it is reprinted in the Appendix at 2a.

The district court order that Lake Havasu City appealed to the Ninth Circuit is not reported. It is reprinted in the appendix at 5a.

JURISDICTION

The memorandum decision of the United States Court of Appeals for the Ninth Circuit was filed on May 14, 1987. Lake Havasu City petitioned for rehearing, and the Ninth Circuit denied the petition on September 28, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 16 of the Clayton Act, 15 U.S.C. § 26, provides in pertinent part:

> Any person, firm, corporation, or association shall be entitled to sue and have injunctive relief, in any court of the United States having jurisdiction over the parties, as against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven, and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue. . . .

In addition, 28 U.S.C. § 1292(a)(1) provides:

> (a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the

judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.

Rule 38, Fed. R. App. P., provides:

If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

STATEMENT OF THE CASE

Lake Havasu City, a municipality in Arizona, advertised in 1982 that it would receive bids and award a contract to a firm to provide trash disposal services to the residents and businesses in the city. Three bidders submitted bids: Joe Turner, Rancho Disposal Service, Inc., and Waste Management, Inc. Joe Turner is a resident of Lake Havasu City who operates waste disposal businesses in Arizona and California. Rancho Disposal, the respondent here, is a California company that previously conducted business only in southern Cali-

fornia. Waste Management is a national waste disposal firm that operates in many states, including Arizona.

Lake Havasu City determined that Joe Turner's bid was the lowest, and it awarded the ten-year contract to him in March 1982. As a result, Turner receives monthly payments from the city under the terms of the contract.

After the city awarded the contract, it learned Turner and Rancho Disposal had rigged the bidding on the contract. The city then commenced this antitrust action in district court against Turner and Rancho Disposal in March 1986, seeking both injunctive relief and damages.[1/] The action contended Turner asked Rancho Disposal

---

[1/] The bases for jurisdiction in the district court were sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, and 28 U.S.C. §§ 1331 and 1337. In addition, the district court had jurisdiction over a pendent state claim based on Arizona's antitrust statutes.

to submit a high, noncompetitive bid to Lake Havasu City. Rancho Disposal agreed to Turner's request and submitted the high bid. By rigging the bidding, Turner was able to deceive the city and inflate his own bid price, which the city accepted.

Soon after Lake Havasu City commenced this action, Rancho Disposal filed a motion seeking partial summary judgment on the city's claim for injunctive relief under section 16 of the Clayton Act and under state antitrust law. Rancho Disposal argued in its motion that injunctive relief was unwarranted for two reasons: (1) at most, Rancho Disposal was involved in an antitrust conspiracy that, according to Rancho Disposal, terminated in 1982 when the conspirators submitted their bids to Lake Havasu City; (2) Rancho Disposal does not intend to submit any more bids or solicit any more business in Arizona.

Significantly, Rancho Disposal did not contend that there had been no bid rigging conspiracy or that Rancho Disposal had not been a conspirator. In other words, the basis for Rancho Disposal's motion was not that there was no conspiracy and an injunction was inappropriate for that reason. Rather, the basis for Rancho Disposal's motion was that, even assuming there was a bid rigging conspiracy, an injunction was unnecessary for other reasons. Because Rancho Disposal did not contest the conspiracy issue, the district court recognized that, in resolving the motion for summary judgment, it was required to assume Rancho Disposal's participation in the conspiracy.

In response to the motion, Lake Havasu City pointed out that, as a matter of law, Rancho Disposal was involved in a continuing antitrust violation. In accordance with United States v. Walker, 653 F.2d 1343

(9th Cir. 1981), the conspiracy continues as long as at least one of the conspirators receives economic benefits from Lake Havasu City under the terms of the contract, and as long as the conspiracy continues to inflict harm on the city. Moreover, in accordance with Grunewald v. United States, 353 U.S. 391 (1957), the conspiracy is a continuing one because the officers of Rancho Disposal continue to take affirmative steps to conceal the conspiracy. In summary, Lake Havasu City argued that under section 16 of the Clayton Act, injunctive relief is appropriate in cases involving continuing antitrust violations. The city also argued an injunction is appropriate to prevent future violations, especially where, as here, Rancho Disposal has not renounced the conspiracy or set forth any evidence showing that it will refrain from participating in future violations.

The district court granted the motion and dismissed Lake Havasu City's claim for injunctive relief against Rancho Disposal.[2/] The court did not issue an opinion explaining its reasons for denying injunctive relief in a summary judgment proceeding, without the court hearing evidence on the exact nature and extent of Rancho Disposal's participation in the bid rigging conspiracy. In accordance with 28 U.S.C. § 1292(a)(1), Lake Havasu City appealed the denial of injunctive relief to the Ninth Circuit. Rancho Disposal did not dispute that the Ninth Circuit had jurisdiction under section 1292(a)(1).

On May 14, 1987, the Ninth Circuit affirmed the district court's decision.

[2/] Lake Havasu City's claim for injunctive relief against defendant Joe Turner was not affected by the district court's order. In addition, Lake Havasu City's claim for damages was not affected by the court's denial of injunctive relief.

Although a prior Ninth Circuit decision, SEC v. Koracorp Industries, Inc., 575 F.2d 692 (9th Cir. 1978), held that a district court may not dismiss a claim for an injunction in a summary judgment proceeding without an opportunity to know all the facts, the Ninth Circuit's decision in this case did not even mention its prior decision in Koracorp.[3/] Instead, the Ninth Circuit ruled that the district court has discretion to deny an injunction in a summary judgment proceeding. Further, the court stated, "the fact one of the other participants in the scheme is still receiving payments is insufficient to establish a continuing conspiracy." See Appendix at

---

3/ According to Koracorp, in a summary judgment proceeding, the district court has no way of determining the defendant's degree of culpability in the violation or defendant's credibility, both of which must be known in order to assess properly the likelihood of future violations and the need for an injunction. 575 F.2d at 698-99.

4a. Thus, the court determined the conspiracy was not a continuing one even though Turner was still receiving monthly payments from Lake Havasu City. Finally, the court stated that because Lake Havasu City did not show "imminent harm threatened that would justify this interlocutory appeal," the appeal was frivolous, warranting the award of attorney's fees and double costs under Rule 38, Fed. R. App. P.

REASONS FOR GRANTING THE WRIT

I. The Lower Courts Are Divided On How To Apply This Court's Decision In Carson To Interlocutory Appeals Of Injunction Orders

In Carson v. American Brands, Inc., 450 U.S. 79 (1981), the Court held that a district court's order denying approval of a consent decree was immediately appealable under 28 U.S.C. § 1292(a)(1). The Supreme Court stated the order disapproving the consent decree was appealable because the appellant demonstrated the order had a

"serious, perhaps irreparable, consequence" such that it could be "effectually challenged" only by immediate appeal. 450 U.S. at 84. Thus, the Court used a test requiring a showing of serious consequences in order to pursue an interlocutory appeal under section 1292(a)(1).

The interlocutory order at issue in Carson was not an order that explicitly denied an injunction. Instead, the order only had the practical effect of denying an injunction because the disapproved consent decree contained provisions for prospective relief. In addition, the order at issue in Carson did not address or relate to the merits of the case. Because of the nature of the order at issue in Carson, disagreements have arisen among the lower courts as to whether the Carson test applies when the interlocutory order at issue explicitly denies an injunction or when the order addresses the merits of the case.

In Brown v. Kerr-McGee Chemical Corp., 767 F.2d 1234 (7th Cir. 1985), cert. denied, 106 S.Ct. 1378 (1986), Judge Wood explained why the courts are having difficulty applying Carson:

> Carson has raised some questions because, although the Supreme Court states that the "serious, perhaps irreparable, consequences" test is applicable to interlocutory judgments appealed under section 1292(a)(1), id. at 84, 101 S.Ct. at 996, the Court relies primarily on cases in which the interlocutory orders were not decisions on the merits of the appellants' claims. See Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478, 480, 98 S.Ct. 2451, 2453, 57 L.Ed.2d 364 (1978)(order denying class certification); Switzerland Cheese Association, Inc. v. E. Horne's Market, Inc., 385 U.S. 23, 24-25, 87 S.Ct. 193, 194-195, 17 L.Ed.2d 23 (1966)(appellants sought interlocutory review of district court's denial of appellants' motion for summary judgment); Baltimore Contractors, 348 U.S. at 177, 75 S.Ct. at 250 (district court order refusing to stay a state court accounting action pending arbitration).

767 F.2d at 1238.

Consistent with Judge Wood's observation, several courts have concluded Carson does not apply to interlocutory injunction orders that reach the merits of the case. Winterland Concessions Co. v. Trela, 735 F.2d 257, 261 (7th Cir. 1984)("in recent cases denying interlocutory appeal of orders which have the effect of denying an injunction, the [Supreme Court] has not found jurisdiction under § 1292(a)(1) when the order appealed from failed to address the merits of the case."); Center for National Security Studies v. Central Intelligence Agency, 711 F.2d 409, 412 (D.C. Cir. 1983)("If the order fails to address the merits of the case, appeal will be under § 1292(a)(1) only if appellant can show serious, perhaps irreparable, harm resulting from delay caused by denial of review. When, however, the order involves a decision directly addressing the merits

of the case, an immediate appeal is available under § 1292(a)(1)"); Tokarcik v. Forest Hills School District, 665 F.2d 443, 447 (3d Cir. 1981), cert. denied sub nom., Scanlon v. Tokarcik, 458 U.S. 1121 (1982)("When interlocutory orders do not irrevocably affect the merits of the controversy, the [Supreme Court], in fear of bringing a flood of pretrial orders within the § 1292 exception, has been reluctant to compromise the congressional policy against piecemeal appeals.").

In addition, courts have also concluded that the Carson requirement of a showing of serious, perhaps irreparable, consequences does not apply to appeals of interlocutory orders that explicitly deny injunctions. Donovan v. Robbins, 752 F.2d 1170, 1173 (7th Cir. 1984)("A definitive disposition of a request for a permanent injunction is appealable under section

1292(a)(1). . . ."); I.A.M. National Pension Fund v. Cooper Industries, Inc., 789 F.2d 21, 24 n.3 (D.C. Cir.), cert. denied, 107 S.Ct. 473 (1986)("Carson does not apply to an order clearly granting or denying a specific request for injunctive relief; such orders are always appealable under § 1292(a)(1)."); Cable Holdings of Battlefield, Inc. v. Cooke, 764 F.2d 1466, 1471 (11th Cir. 1985)(Carson only applies to interlocutory orders that have the practical effect of refusing an injunction, not to orders that explicitly refuse an injunction).

Conversely, some courts have ruled that the Carson requirement of a showing of serious, perhaps irreparable, consequences applies to all interlocutory orders that address the merits of the claim. Woodard v. Sage Products, Inc., 818 F.2d 841, 852 (Fed. Cir. 1987); South Bend Consumers Club, Inc. v. United Consumers Club, Inc.,

742 F.2d 392, 393-94 (7th Cir. 1984); United States v. RMI Co., 661 F.2d 279, 281-82 (3d Cir. 1981); Gould v. Control Laser Corp., 650 F.2d 617, 621 (5th Cir. 1981). For these courts, the appellant's inability to show serious, perhaps irreparable, consequences means that the order at issue is not appealable under section 1292(a)(1), and that the appeal should be dismissed for lack of jurisdiction.

The foregoing cases clearly show that there is a split among the circuits, and even a split within the Third and Seventh Circuits, on how to apply Carson. Commentators also agree that the Carson rule is difficult to apply:

> The difficulty caused by the "serious, perhaps irreparable, consequence" test in this area is the same as in others. There is no clear guide to appealability, a consequent temptation to make the attempt, and fertile ground for litigating appellate jurisdiction. Even if it would indeed be better to deny all appeals

> under § 1292(a)(1) in these circumstances, relying on other tools to reach the small number of cases in which appeal is really justified, a compromise approach that hinges appealability on an elusive and discretionary test may prove more costly than a clear rule that permits appeal without further ado.

C. Wright, A. Miller, and E. Cooper, Federal Practice and Procedure, § 3924 at 52-53 (Supp. 1987).

In the present case, the Ninth Circuit applied the serious consequences requirement of Carson in an unprecedented, hybrid manner. The district court's order explicitly denied an injunction based on the merits of the claim, and on appeal Lake Havasu City accordingly made no showing of serious consequences. The Ninth Circuit used the Carson requirement of serious consequences (which the court called "imminent harm") not to dismiss for lack of jurisdiction, but instead, as a basis for imposing attorney's fees against Lake Havasu City.

The Ninth Circuit's rule, thus, is that although an appellant need not show serious, perhaps irreparable, consequences in order to confer appellate jurisdiction over an order explicitly denying an injunction, the appellant must nonetheless show serious consequences in order to avoid sanctions. No other circuit court has applied Carson in such a way.

The conflict among the circuits on applying Carson to the significant area of appellate jurisdiction warrants the grant of certiorari.

II. The Decisions Of The Courts Below Conflict With Decisions Of This Court

In United States v. Ward Baking Co., 376 U.S. 327 (1964), the government alleged in a civil antitrust action that defendant bakeries rigged the bidding on contracts to supply bakery products at Navy installations. After a period of settlement negotiations and prior to a trial, the bakeries

filed with the district court a proposed form of judgment which contained some injunctive relief. The government objected to the proposed injunction because, inter alia, it did not enjoin defendants from entering into similar conspiracies that would harm purchasers other than the government; the proposed injunction only prohibited future bid rigging conspiracies aimed at Navy installations. The district court overruled the government's objection and entered the judgment without a trial. On direct appeal, the Supreme Court reversed, stating:

> This Court has recognized that a "full exploration of facts is usually necessary in order [for the District Court] properly to draw [an antitrust] decree" so as "to prevent future violations and eradicate existing evils." Associated Press v. United States, 326 U.S. 1, 22. . . . It should be a rare case where all the facts necessary for a trial court to decide whether a disputed item of relief was warranted could be determined without an opportunity to know the record.

376 U.S. at 330-31. Continuing, the Court noted that after a trial and an opportunity to "appraise the need for prohibitions or affirmative actions," it would perhaps then be proper for the district court to conclude the injunction requested by the government was not warranted. 376 U.S. at 333. Without a trial, however, the district court could not determine whether the injunction requested by the government was appropriate.

In this case, the district court recognized that it was required to assume Rancho Disposal actually participated in the bid rigging conspiracy alleged in the complaint. With the violation established, but without the court knowing the nature or extent of Rancho Disposal's participation, motivation, or reformation, the court dismissed the claim for injunctive relief. Obviously, in a summary judgment proceeding, the court had no opportunity to "know

the record," as required by Ward Baking.

Even the standard of review applied by the Ninth Circuit to the district court's order is not consistent with this Court's pronouncements on the proper standard of review. The Ninth Circuit reviewed the district court's order under an abuse of discretion standard. Repeatedly, this Court has stated that in antitrust cases, a district court's orders regarding injunctive relief are not subject to reversal only for abuse of discretion. Instead, the reviewing court should apply a more in-depth scope of review to a district court's injunction orders in antitrust actions. United States v. Glaxo Group, Ltd., 410 U.S. 52, 64 (1973); United States v. Loew's, Inc., 371 U.S. 38, 52 (1962); United States v. United States Gypsum Co., 340 U.S. 76, 89 (1950). Here, the Ninth Circuit's use of the abuse of discretion

standard was contrary to this Court's rulings.

III. The Courts Of Appeals Are Divided On Determining Whether A Bid Rigging Conspiracy Is A Continuing Conspiracy

In this case, the Ninth Circuit ruled the bid rigging conspiracy was not continuing even though one of the conspirators, Joe Turner, continued to receive payments from Lake Havasu City, the victim of the conspiracy. This ruling is directly contrary to a recent decision by the Eighth Circuit.

In United States v. Northern Improvement Co., 814 F.2d 540 (8th Cir.), cert. denied, 108 S.Ct. 141 (1987), the United States charged a group of firms and individuals with bid rigging. The district court dismissed the indictment, finding it barred by the statute of limitations. On appeal, the government argued that the conspiracy was a continuing one, and therefore

not barred, because some of the defendants continued to receive payments from the victims of the bid rigging scheme. The United States also argued that the conspiracy was a continuing one even with respect to the co-conspirators who did not receive payments. Reply Brief for United States at 9. According to the government's argument, once a conspirator joins the conspiracy, the acts of his co-conspirators in accepting payments from the bid rigging victim are admissible against him to show the continuing nature of the conspiracy. The Eighth Circuit agreed with the government's argument. 814 F.2d at 543 n.1. The court ruled a bid rigging conspiracy is a continuing one with respect to all conspirators if one of the conspirators receives payments. It is not necessary for all the conspirators to receive payments in order for the conspiracy to be a continuing one.

Here, the Ninth Circuit stated, "the fact that one of the other participants in the scheme is still receiving payments is insufficient to establish a continuing conspiracy." The Ninth Circuit's decision conflicts with the rule of law adopted by the Eighth Circuit.

IV. Rule 38 Was Inappropriately Used As A Basis For Awarding Sanctions

Rule 38, Fed. R. App. P., authorizes a court of appeals to award attorneys fees and double costs against appellants who bring frivolous appeals. "An appeal is frivolous when it involves legal points that are not arguable on their merits," Sturgeon v. Airborne Freight Corp., 778 F.2d 1154, 1161 (5th Cir. 1985), or when the arguments on appeal are "wholly without merit." Kehr v. Smith Barney, 736 F.2d 1283, 1288 (9th Cir. 1984). Conversely, if the law on an issue on appeal is not clearly contrary to the appellant's

position -- as where the courts of appeals are divided on the issue -- the appeal is not frivolous. Acosta v. Louisiana Dept. of Health and Human Resources, 106 S.Ct. 2876, 2877 (1986) (because the courts of appeals were divided on the issue of law that was the subject of the petition for certiorari, the petition was not frivolous).

In this case, several issues were involved in the appeal to the Ninth Circuit. The central issue was whether a district court may deny injunctive relief in a summary judgment proceeding in a case in which the violation alleged in the complaint is established. The Ninth Circuit previously addressed that issue in Koracorp, a securities action, where the court ruled a district court must know the nature and extent of a defendant's culpability in a violation in order to determine whether there is a threat of future violations warranting an

injunction. In a summary judgment proceeding, a court simply has no way of determining the nature and extent of a defendant's culpability is impossible:

> Neither the character of a defendant's past violations nor the bona fides of an expressed intent to comply can be ascertained without determination of the acts and conduct of each of these defendants in connection with the violations. An admission that illegal acts occurred for which someone had responsibility, perhaps a little bit of which might be attributed to a particular defendant, provides no clue to any defendant's state of mind for use as a predictor of his future conduct. . . . The allocation of responsibility depends heavily upon the credibility of the testimony of the several defendants. . . . Only after an evidentiary hearing or a full trial can these credibility issues be appropriately resolved.

575 F.2d at 699 (emphasis added). Accord, United States v. Ward Baking Co., 376 U.S. at 331 (district courts should not make decisions about injunctive relief in antitrust actions without the benefit of a trial).

The Ninth Circuit in Koracorp further ruled that even if a defendant promises not to re-enter the market where he committed the violation, summary judgment denying injunctive relief still is not appropriate:

> The promises of defendants to obey the law and not to re-enter the securities market are, of course, expressions of the defendants' states of mind and are relevant to a determination of the likelihood of repetition. These statements are, however, self-serving and highly dependent on the credibility of the individuals making the statements. . . . On this record, the district court could not decide that these defendants, or any of them, would not be recidivists.

575 F.2d at 699 (emphasis added). Accord, United States v. Concentrated Phosphate Export Assn., 393 U.S. 199, 203 (1968) (statements from antitrust defendants that they will cease doing business are insufficient to show remote likelihood of future violations); Williams v. Alioto, 549 F.2d 136, 143 (9th Cir. 1977) ("The defendants have a heavy burden of showing that they

will not revive their challenged conduct, and mere disclaimers are not satisfactory."). Thus, Rancho Disposal's assertion that it will not submit any other bids in Arizona is insufficient under Koracorp to warrant summary judgment on a claim for an injunction.

Koracorp is clear authority supporting Lake Havasu City's argument on appeal. That case, by itself, shows that the appeal was not frivolous.

In addition, under precendent from the Ninth Circuit and other courts, this case presents several indicators of a likelihood of future violations, lending still further support to the argument that injunctive relief should not have been denied in a summary judgment proceeding. For example, a likelihood of future violations is inferred from Rancho Disposal's past violation. SEC v. Murphy, 626 F.2d 633, 655 (9th Cir. 1980). The fact that the

conspiracy is continuing, as described above at pp. 7 to 8, is another indicator of a likelihood of future violations. Commodity Futures Trading Comm. v. British American Commodity Options Corp., 560 F.2d 135, 142 (2d Cir. 1977). Finally, because Rancho Disposal has not expressed any intent to reform, that factor also shows a danger of future violations. SEC v. Murphy, 626 F.2d at 655.

Although the Ninth Circuit in this appeal applied the Carson standard to an order explicitly denying an injunction based on the merits of the case, the discussion above at pp. 11 to 19 shows that the circuits are divided on whether Carson applies to such an order.

In view of the substantial authority -- particularly Ninth Circuit authority -- supporting Lake Havasu City's appeal, it cannot be said that the appeal was "wholly

without merit." Accordingly, the imposition of sanctions under Rule 38 was totally unwarranted. A writ of certiorari should issue to review the award of sanctions. Summary review of this issue perhaps would be appropriate.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General of Arizona
Counsel of Record

ALISON B. SWAN
Chief Counsel
GARY P. BRADY
Assistant Attorney General
Antitrust Division
1275 West Washington
Phoenix, Arizona 85007
(602) 255-4751
Counsel for Petitioner

A P P E N D I X

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAKE HAVASU CITY,	*	No. 86-2716
Plaintiff-Appellant,	*	D.C. No. CV-86-425-PCT CLH
v.	*	
RANCHO DISPOSAL SERVICE, INC.,	*	MEMORANDUM*
Defendant-Appellee.	*	

Appeal from the
United States District Court
For the District of Arizona
Charles L. Hardy,
District Judge, Presiding

Submitted May 14, 1987**
San Francisco, California

Before: KENNEDY and KOZINSKI, Circuit Judges, and GRAY, District Judge.***

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 21.

[Footnote continued on page 3a.]

Lake Havasu City (LHC) appeals the district court's order granting the motion of Rancho Disposal Service, Inc., for partial summary judgment dismissing LHC's claims for injunctive relief. We review the denial of injunctive relief for abuse of discretion. SEC v. Rogers, 790 F.2d 1450, 1455 (9th Cir. 1986).

The district court did not abuse its discretion in dismissing the claim for injunctive relief. The undisputed facts indicate no likelihood of "a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue

---

[Footnotes continued from page 2a.]

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); Ninth Cir. R. 3(f).

*** The Honorable William P. Gray, United States District Court for the Central District of California, sitting by designation.

or recur." Zenith Radio Corp. v. Haseltine Research, Inc., 395 U.S. 100, 130 (1969). The complaint alleges only an isolated transaction; the fact that one of the other participants in the scheme is still receiving payments is insufficient to establish a continuing conspiracy. In addition, the fact that Rancho Disposal engaged in only one transaction in Arizona, conducts no business there now, and does not intend to conduct business there in the future indicates that injunctive relief would be inappropriate.

We find this appeal frivolous. There was no imminent harm threatened that would justify this interlocutory appeal of a matter clearly within the discretion of the district court. Therefore, we award appellee $1250 in attorney's fees and double costs under Fed. R. App. P. 38.

AFFIRMED. APPELLEE IS AWARDED ATTORNEY'S FEES AND DOUBLE COSTS.

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAKE HAVASU CITY,	*	
	*	NO. CIV 86-2716
Plaintiff,	*	
	*	D.C. No.
vs.	*	CV-86-425-PCT CLH
	*	
JOE TURNER, et al.,	*	O R D E R
	*	
Defendants.	*	
	*	

****

Before: KENNEDY and KOZINSKI, Circuit Judges, and GRAY, District Judge.

The petition for rehearing is denied. The full court has been advised of the suggestion for en banc rehearing and no judge has requested a vote thereon. The suggestion for rehearing en banc is therefore rejected. Fed. R. App. P. 35(b).

[Filed September 28, 1987.]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

LAKE HAVASU CITY, Plaintiff, vs. JOE TURNER, et al., Defendants.	)	NO. CIV 86-425 PCT CLH O R D E R

Defendant Rancho Disposal Service, Inc. having filed its motion for partial summary judgment regarding plaintiff's claims for injunctive relief; the matter having come on regularly for hearing before this Court on September 22, 1986, during which counsel were hear; the Court having received and considered the memoranda and arguments of counsel and the evidence presented and being fully advised in the premises and good cause appearing therefor,

THE COURT FINDS AND DETERMINES that there is no disputed issue as to any

material fact and that defendant Rancho Disposal Service, Inc. is entitled to partial summary judgment as a matter of law.

NOW THEREFORE, on the basis of the foregoing and all other matters of record herein,

IT IS HEREBY ORDERED that defendant Rancho Disposal Service, Inc.'s motion for partial summary judgment regarding plaintiff's claims for injunctive relief and the same is hereby granted and that plaintiff Lake Havasu City's claims for injunctive relief against defendant Rancho Disposal Service, Inc. under section 16 of the Clayton Act, 15 U.S.C. § 26, and the Uniform State Antitrust Act, Ariz. Rev. Stat. Ann. § 44-1408(A) be and they hereby are dismissed with prejudice.

DONE IN OPEN COURT this 29th day of September, 1986.

Honorable Charles L. Hardy
United States District Judge